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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TEOFIL BRANK,

Defendant.

Case No. CR 15-00131-JFW

DEFENDANT'S SUPPLEMENTAL BRIEFING ON THE EFFECT OF THE UNITED STATES SUPREME COURT'S DECISION IN JOHNSON V. UNITED STATES ON COUNT 7 OF THE FIRST SUPERSEDING INDICTMENT

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The United States Supreme Court's decision in *Johnson v. United States*, -- U.S. ---, 2015 WL 2473450 (June 26, 2015) mandates that this Court grant defendant's Motion to Dismiss Count 7 of the First Superseding Indictment (Docket No. 97) ("Motion"). Under the analysis set out in *Johnson*, Counts 2 and 5 of the FSI, which contain the alleged "crime of violence" supporting the charge of 18 U.S.C. § 924(c) in Count 7, are not crimes of violence for the following reasons:

- Count 5 of the FSI charges attempted extortion, which is not one of the enumerated crimes in ACCA, and would only qualify as an ACCA predicate under ACCA's residual clause, which has been struck down;
- *Johnson* undermines reliance on the enumerated crimes in determining whether a given crime is an ACCA predicate rendering Count 2 ineligible as a predicate crime of violence;
- Justice Scalia's view on the fatal flaws of ACCA, set out in his dissent in *James*, have won the day and his definition of "extortion," which requires threats of force against person or property, should be applied;
- The *Johnson* decision makes clear that the categorical approach should not be used here, where the Court is not considering a past conviction, but determining whether the jury should be instructed that Count 2 charging extortion through nonviolent threats to reputation and/or Count 5 are crimes of violence, for purposes of establishing the elements of Count 7. Rather, the Court must look to the actual conduct that has been charged here.

II. ARGUMENT

A. Count 5 of the FSI, on Which Count 7 Is Based, Is an Attempt Crime and Not One of the Enumerated Crimes in ACCA, 18 U.S.C. § 924(e)(2)(B)(ii)

Count 5 charges "attempted extortion." Even in the Supreme Court's now-overruled decision in *James v. United States*, 550 U.S. 192 (2007), attempt crimes of any of the four crimes enumerated in the Armed Career Criminal Act (ACCA), i.e., burglary, arson, extortion, or a crime involving the use of explosives (18 U.S.C. § 924(e)(2)(B)(ii)) did not qualify as ACCA predicate convictions under the enumerated crimes, but only under the residual clause. *James*, 550 U.S. at 212 ("[T]he offense of attempted burglary, as defined by Florida law, qualifies under ACCA's residual clause."). Given that *Johnson* held that ACCA's residual clause was void for vagueness in violation of the Due Process Clause of the Fifth Amendment to the Constitution, 2015 WL 2473450 at * 10-11, there is no longer a viable argument that because attempted extortion would be found to qualify under ACCA's residual clause, it should qualify under 18 U.S.C. § 924(c)(3)(B).

The government's entire argument in opposition to the Motion, based on Justice Alito's now overruled majority opinion in *James* is invalid. *See* Gov't Oppo. to Motion at 8-10.

B. *Johnson* Undermines the Viability of ACCA's Four Remaining Enumerated Crimes

As this Court has noted, in the final paragraph of the *Johnson* decision, the Supreme Court makes the following statement: "We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." 2015 WL 2473450 at * 11. At first blush, the holding appears to say that courts should

continue applying the approach set out in the Court's ACCA jurisprudence, just without the residual clause. Closer examination of *Johnson* demonstrates that the "crime of violence" provision is itself a sort of residual clause. It includes any federal felony that "by its nature, involves a substantial risk that physical force against the person or property of another." The phrase "by its nature" means that the risk is measured in the abstract, based on a hypothetical ordinary commission, not on the actual facts of the case. That dooms it under *Johnson*. Even more significantly, here, the applicable statute is 18 U.S.C. § 924(c)(3)(B) and the ACCA definition serves merely as an analogy.

Throughout the *Johnson* opinion, Justice Scalia emphasizes the odd assortment of crimes set out in ACCA's enumerated crimes. In discussing how the government and dissent had pointed out "dozens of federal and state criminal laws" that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'" would be placed in "constitutional doubt" if the Supreme Court were to invalidate ACCA's residual clause, Justice Scalia noted that "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples. 'The phrase 'shades of red,' standing alone, does not generate confusion or predictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so. *James*, 550 U.S., at 230, n. 7 (Scalia, J. , dissenting)." *Johnson*, 2015 WL 2473450 at * 8. Justice Scalia highlights that "[c]ommon sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes," and that "the enumerated crimes are not much more similar to one another in kind than in degree of risk posed . . . ." *Id.* at * 6. "Does the typical extortionist threaten his victim by mail with the revelation of embarrassing personal information?" *Id.*

Given the disparate quality of the four enumerated crimes, the residual clause gave guidance as to the salient common elements in the enumerated crimes. *James*, 550 U.S. at 218-20 (Scalia, J., dissenting). Without the residual clause to inform the

interpretation of the enumerated crimes, courts are faced with four random crimes, having little in common. *Id.*

C. Justice Scalia Defined "Extortion" to Require the Wrongful Use or Threatened Use of Force against the Person or Property of Another

In wrestling with the four disparate crimes enumerated in ACCA, Justice Scalia relied on the doctrine of *noscitur a sociis*, or, "a word is known by the company it keeps," *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), to determine the relevant definition of "extortion" for purposes of ACCA. Justice Scalia considered various definitions, including the Hobbs Act, Blackstone's Commentaries on the Laws of England, various treatises, and the Model Penal Code. *James*, 550 U.S. at 221-22 (Scalia, J., dissenting) (citations omitted). Justice Scalia concluded that "[t]he word 'extortion' in ACCA's definition of 'violent felony' cannot, however, incorporate the full panoply of threats that would qualify under the Model Penal Code, many of which are inherently nonviolent." *Id.* at 222. Justice Scalia's primary reason for this conclusion was, applying the doctrine of *noscitur a sociis*, that "[t]he words immediately surrounding 'extortion' in § 924(e)(2)(B)(ii) are 'burglary,' 'arson,' and crimes 'involv[ing] use of explosives.' The Model Penal Code's sweeping definition of extortion would sit uncomfortably indeed amidst this list of crimes which, as the 'otherwise' residual provision makes plain, are characterized by their potential for violence and their risk of physical harm to others." *Id.* Justice Scalia settled on the following definition for "extortion" for ACCA purposes: "the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person or property of another." *James*, 550 U.S. at 224 (Scalia, J., dissenting). This definition controls this Court's analysis.[1]

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[1] Notably, Justice Scalia, in his dissent in *James*, noted that the Ninth Circuit had struggled with the definition of "extortion" for ACCA purposes in *United States v. Anderson*, 989 F.2d 310, 311 (9th Cir. 1993) and had decided on the Hobbs Act definition. *James*, 550 U.S. at 223 n. 3. Justice Scalia thus plainly considered and

D. *Johnson* Makes Clear That the Categorical Approach Should Not Apply Here

Perhaps most significantly, *Johnson* makes clear that the categorical approach should not be applied here. In the section of the opinion discussing other federal and state laws that "use terms like 'substantial risk[2],'" Justice Scalia notes that these types of laws "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion," *Johnson*, 2015 WL 2473450 at * 8, and that "[t]he residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." "Because 'the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,' this abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with the imaginary condition other than the facts.'" *Id.* (citation omitted). In other words, here, the Court must look at the Indictment to see what is charged and not imagine an idealized "ordinary case of the crime."[3]

The difference between a court seeking to apply an ACCA enhancement and a court in the instant position is clear: in the ACCA context, the sentencing court is looking back, and trying to reconstruct what happened in prior cases, often in disparate jurisdictions, with limited documentation. However, in applying § 924(c), this Court

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rejected this approach as too broad and not in keeping with the doctrine of *noscitur a sociis* in his *James* dissent. Justice Scalia's views in his *James* dissent have won the day. Justice Scalia's reading of the statute is now the controlling view.

[2] Title 18 U.S.C. § 924(c)(3)(B) uses the term "substantial risk": it defines a "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Notably, the government has specifically eschewed charges that Mr. Brank intended to use any force against person or property; rather, the government specifies in the FSI that Mr. Brank intended to harm D.B.'s reputation by posting comments on Twitter.

[3] Indeed, the Court must determine whether the crime charged here is a crime of violence before deciding to instruct the jury on Count 7, the § 924(c) charge. The government's own proposed jury instruction on Count 7, which is based on Ninth Circuit Model Jury Instruction No. 8.72, requires that the Court instruct the jury that "the crime of attempted extortion as charged in Count 5 of the indictment . . . is a crime of violence." Docket No. 182 at 29.

looks to the facts of the case presently before it, as it has been charged, to determine how it will instruct the jury regarding an alleged underlying crime of violence. Here, an examination of the FSI shows that neither Counts 2 or 5 charge a crime of violence: they charge nonviolent threats to reputation via social media. The *Johnson* opinion makes clear that in this situation, the Court must look to what the instant defendant is accused of having actually done, and not imagine some "ordinary case" or idealized generic case of what he has done. 2015 WL 2473450 at * 8. And this makes sense: the concerns underlying and justifying the categorical approach – namely, a recognition of the impossibility of requiring a sentencing court to go back into the weeds of prior convictions and parse out precisely what conduct was at issue in each case, rather than simply relying on the language of the statute of the conviction – are simply not implicated here.

III. CONCLUSION

For these reasons, Mr. Brank respectfully requests that this Court reconsider its prior order (Docket No. 187) denying defendant's Motion to Dismiss Count 7 of the First Superseding Indictment (Docket Nos. 97) and grant the motion.

Respectfully submitted,

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By */s/ Seema Ahmad*

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